United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2109 To be argued by JOAN P SCANNELL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RAYMOND GILLIARD, FRANCIS BLOETH and JOHN SUGGS,

Plaintiffs-Appellees,

-against-

RUSSELL OSWALD, Commissioner of Correctional Services, J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility,

Defendants-Appellants.

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B P/S

BRIEF FOR DEFENDANTS-APPELLANTS

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Preliminary Statement

Defendant-appellant appeals from a decision of the United States District Court for the Northern District of New York, (Port, J.) dated July 22, 1976 granting plaintiffs, after a bench trial, monetary damages in the respective amounts of $715.00 in favor of plaintiff Gillard, $748.25 in favor of plaintiff Bloeth and $740.00 in favor of plaintiff Suggs, for an alleged deprivation of plaintiffs' constitutional rights pursuant to 42 U.S.C. § 1983.

Questions Presented

1. Whether the emergency measures taken by correctional authorities were justified and in accordance with law.

2. Assuming arguendo that plaintiffs' constitutional rights were violated whether the District Court's conclusion that defendants LaVallee and Oswald were personally liable was clearly erroneous in view of their good faith and the unsettled state of the law at that time.

3. Whether the District Court's finding that defendant Oswald had knowledge of the segregation and was therefore liable was clearly erroneous.

Facts

On February 15, 1973, after numerous assaults on inmates and an increasing fear of danger and revolt, a state of emergency was declared at Clinton Correctional Facility (T. 104-105).* Plaintiffs, who were at that time

*The numbers in parenthesis preceded by T. refer to the pages of the Minutes of Trial.

inmates at Clinton Correctional Facility, along with the majority of the other inmates at the Facility, were keep-locked in their cells (107-108). On February 23, 1973, pending an investigation to determine if certain inmates in fact participated in the assault, plaintiffs along with 125-150 other inmates, were removed from the general population and placed in E Block which was converted into a Special Housing Unit (T. 5, 13). Each plaintiff received notice that such removal was being done because of the emergency situation and pursuant to Section 251.6(f) of Title 7 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Such section reads as follows:

> "§ 251.6(f) The provisions of this section shall not be construed so as to prohibit emergency action by the superintendent of the facility and, if necessary for the safety or security of the facility, all inmates or any segment of the inmates in a facility may, on the order of the person in charge of the facility, be confined in their cells or rooms for the duration of any period in which the safety or security of the facility is in jeopardy. In any such case the superintendent shall immediately notify the commissioner."

On or about March 12, 1973, when in the judgment of those at the Facility a state of emergency still existed, plaintiffs along with the other inmates were moved to Unit 14 pending the continuing investigation and the possibility of transfer to another institution (T. 2, 133-136). On or around March 28, 1973 plaintiffs were transferred to Adirondack Correctional Treatment and Evaluation Center (T. 39, 58, 80).

During the first week of April a report was made to the Commissioner's office declaring that the emergency had ended (T. 133). Plaintiffs instituted the instant action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 in the United States District Court for the Northern District of New York alleging a deprivation of their due process rights and seeking compensatory damages in the respective amounts of $825.66 for plaintiff Gilliard and $850.00 each for plaintiffs Bloeth and Suggs. Plaintiffs also sought punitive damages in the amount of $330.00 for plaintiff Gilliard and $340.00 each for plaintiffs Bloeth and Suggs.

Trial

At trial the Deputy Superintendent in charge of Security at Clinton Correctional Facility, Mr. William Gard, and the three plaintiffs, testified. Mr. Gard testified that on February 15th 1973 it became necessary to close down the Facility and to "keeplock" all inmates except for a minimum work force, in their cells (T. 104). Mr. Gard testified that such action became necessary after several assaults had occurred within the facility on the morning of February 15th. He further testified that he had been apprehensive for several days prior to said date and for as long as three or four weeks prior thereto he had been having "difficulty in the facility" and there existed an atmosphere of unusual contention (T. 104). He testified that a series of assaults had occurred on January 25, 1973 and that such assaults generated considerable unrest and contention in the facility (T. 104).

Deputy Superintendent Gard testified that on February 15th five inmates were injured, four by direct assault, and at least two of the assaulted people were so seriously injured that they had to be taken from the

facility and be treated at the Champlain Valley Physicians' Hospital at Plattsburgh, New York (T. 105).

Mr. Gard testified that there was an unusual atmosphere of fear and unrest among the inmates at the facility. He then made a recommendation to Superintendent LaVallee that "we should close down, and I thought that we were in a very serious situation" (T. 105). Thus on February 15, 1973 the Superintendent J. Edwin LaVallee, declared that a state of emergency existed at Clinton Correctional Facility. Almost all the inmates were then keeplocked and a five day search of each inmate was conducted. After the search of the inmates was concluded, groups of inmates were let out into controlled areas, that is, areas which had also been searched. The search of the entire facility took approximately ten to fourteen days (T. 144-145). The search revealed many homemade weapons which the defendants offered and the court received into evidence. See Defendants Exhibits "A" through "G". The Court also received in evidence several other defendants exhibits all of which were supportive of defendants' position that there was justification for the declaration of an emergency by Superintendent LaVallee on February 15, 1973 and that the action taken by the authorities at Clinton Correctional Facility for several weeks subsequent thereto was legally justified. See Defendants' Exhibits "H", "I",

"J" and "K".

In connection with the declaration of emergency, Superintendent LaVallee directed Deputy Superintendent Gard to initiate an investigation in order to determine the nature and extent of the disturbance giving rise to said assaults and to identify those inmates who may be involved, directly or indirectly, in such disturbance (T. 136-137).

A group of senior employees was then formed to receive and screen information which was obtained from employees and inmates from the fourteen areas within the facility. At the outset the whole inmate population was investigated individually. A list was then obtained from each of the fourteen areas which listed independently the names of inmates reported to be involved in the assaults and disruptive activity. The names of the three plaintiffs appeared on several of the lists (T. 136-139, 154). At this point a more intensive investigation was begun on the background and activities of the plaintiffs and approximately one hundred and forty other inmates whose names appeared on the lists. Mr. Gard testified that with so many people expressing fear it was necessary to separate these inmates,

including plaintiffs, from the general population (173). They were then placed in a Special Housing Unit E Block away from the general population in order to prevent any possible spreading of agitation (T. 179). While in segregation the inmates were not deprived of any food, were allowed exercise privileges in addition to showers. Moreover, the inmates were allowed to retain most of their personal property, and received visits (T. 35, 36, 46, 51, 73-75, 79, 84). Plaintiff Suggs testified that he was permitted to go to religious services (T. 45).

As part of the investigation, the Bureau of Criminal Investigation of the New York State Police were called in for the purpose of investigating the specific assaults which took place. Ninety-four inmates were charged with specific instances of misbehavior and, in addition thereto, forty-seven inmates were retained in a keeplock status pending completion of a review by Deputy Superintendent Gard of each individual case. No charges were made against the plaintiffs but they were transferred to another facility on or about March 28, 1973. Mr. Gard further testified that the emergency situation lasted till

the beginning of April. The stability returned to the facility at a very slow pace (T. 185-186). Mr. Gard also testified that the reports from inmates indicated that the inmate population felt their safety returning with each transfer of the segregated inmates out of the facility (T. 186).

Mr. Gard testified that a communication from the Superintendent to Mr. Oswald dated February 22, 1973 which was offered into evidence as Exhibit "I", stated that it was bringing the Commissioner up to date on the investigation and listed the inmates being held in keeplock (T. 123). He further testified that a letter dated March 2, 1973 offered into evidence a defendants Exhibit "K" was sent to Deputy Commissioner Quick and stated that the attached list of inmates were continuing in same status pending our RX program which Mr. Gard explained as meaning recommended for transfer. Mr. Gard testified that an Executive Committee meeting was held at the facility to deal with the emergency. The Commissioner sent Mr. Patrick Fish from their counsels office to help deal with the emergency (T. 127-129). During the first week of April, 1973 a final report was sent to

the Commissioner's office stating that as of that time the emergency had terminated and listing the status of the inmates (T. 133).

Plaintiff Bloeth testified that as of February 15, 1973, he was confined to C Block at Clinton Correctional Facility. He worked as a "Block Porter" and testified that he earned twenty-five cents a day (T. 9-10). He testified that on February 15, 1973 the entire prison was closed down "for a general shakedown" because of some stabbings of some type (T. 11). The so-called shakedown resulted in everyone in the institution being keeplocked for "about three days" (T. 12). Bloeth testified that around the 18th or 19th of February the gallery officer told him that he was to be placed in keeplock (T. 13) and on the next day a Sergeant Woods' brother Ernnet Woods, told Bloeth he was going to be transferred (T. 14) and Bloeth was put in E Block which was converted into a Special Housing Unit (T. 15). According to Bloeth "probably 250 to 300 guys were placed in E Block" (T. 15). In response to a question as to whether or not he was ever told why he was placed in E Block, Bloeth said that he received a paper from Sergeant McCormick received in evidence

as plaintiffs' Exhibit 1 (T. 17) which stated that "as a result of a disturbance on February 15, 1973 I have taken the action of placing you among others in keeplock status." The notice provided the authority for such action was Section 251.6f of Title 7 of the official Rules and Regulations. Bloeth testified that when he was handed this paper the correction officer who gave it to him had a pile of these papers about an inch thick. Bloeth estimated that the pile contained "probably one hundred or one hundred fifty" of these notices (T. 17).

While in E Block Bloeth testified that he "never had an official hearing" but he did see Assemblyman Eve and two people who came around one evening to inquire of him what was going on (T. 18). Bloeth testified that he "couldn't even get medication" while he was in E Block, yet he also testified that he "had a dental problem, and while confined to E Block he was taken to the hospital dentist to get treatment" (T. 19).

Bloeth testified that he stayed in E Block until around March 12 at which time he was told to pack up that he was moving and was put in Unit 14. When asked if all the inmates who were in E Block, i.e., numbering "250 or 300, transferred to Unit 14", Bloeth replied that ten or twelve were transferred to Unit 14 and that about 100 or so were transferred to other institutions and the rest Bloeth assumed were put back in the population (T. 19, 20).

Bloeth testified that he was not given a hearing before going to Unit 14 but that after arriving in Unit 14 he demanded a hearing and appeared before three people. He asked them why he was in Unit 14 and they looked at his disciplinary card and said that as far as his disciplinary card was concerned he was "not in Unit 14". They (the three people) told him that apparently it is the Superintendent's orders [T. 21]).

In addition to his appearance before these three people (obviously the Adjustment Committee) Bloeth testified that while in Unit 14 he spoke to Commissioner William Quick who happened to be in Unit 14 visiting and upon asking Commissioner Quick why he was in Unit 14 he (Bloeth) was asked

by Commissioner Quick concerning prior incarcerations in state correctional facilities. Bloeth told the Commissioner that before he came to Clinton he was at Green Haven and before Green Haven he was at Attica and prior to Attica he was at Clinton. Commissioner Quick then advised Bloeth "That is why you are in Unit 14" (T. 22).

Bloeth testified that he left Unit 14 "around March the 28th" when he went to ACTEC (Adirondack Correctional Treatment and Evaluation Center, Dannemora, New York) (T. 39).

Plaintiff Suggs testified that as of February 15, 1973 he was in E Block. He stated he "was there because this idle company is there and I was waiting for a job" (T. 43). Suggs stated that he also received a formal notice identical to the one furnished to plaintiff Gilliard which was introduced into evidence as plaintiffs' Exhibit 1 (T. 52). Suggs testified that he remained in E Block until March 12th when he was transferred to Unit 14 (T. 52, 53). In response to a question as to whether or not he was given a hearing at any time while in Unit 14, Suggs replied in the negative and stated that "people came by, like some Commissioners and all, but they never said nothing to me."

Suggs stated, "I asked the brass" and they told him "Sorry, we don't know what the story is on you. You are just here on administration keep-lock." (T. 54).

Suggs testified that he remained in Unit 14 "until the 28th of May" (T. 58). (This is a typographical error. Suggs actually left Unit 14 on the 28th of March when he was transferred to Adirondack Correctional Treatment and Evaluation Center.)

Plaintiff Gilliard testified that on February 13, 1973 he was confined in B Block at Clinton Correctional Facility. Gilliard stated that B Block was part of general population. In response to a question as to whether or not he was employed during the period he was in general population, Gilliard replied in the affirmative stating that he was the head mechanic in the weave shop and was receiving a dollar a day in wages (T. 67, 68). However, on cross-examination, Gilliard admitted that his employment in the weave shop was terminated in January of 1973 (T. 88).

Gilliard was placed in E Block on February 23, 1973 and was transferred to Special Housing Unit 14 on March 12, 1973. Gilliard testified that he also received a copy of a formal notice identical to plaintiffs' Exhibit 1

on February 23 (T. 72). Gilliard also testified that Assemblyman Eve and "Coordinators, or Associates," * * * "came and interviewed" him while in Unit 14 (T. 75). He also testified that an attorney visited him while he was in Unit 14 (T. 79). He stated he was transferred out of Clinton Correctional Facility on "the 27th or the 28th of March", 1973.

Decision

After a bench trial at which the three plaintiffs, and William Gard, Deputy Superintendent in charge of Security, testified, the Court granted compensatory damages in favor of the plaintiffs as against Superintendent LaVallee and Commissioner of Corrections Russell G. Oswald. The Court found that plaintiffs confinement in Special Housing Units on or after February 23, 1973 constituted substantial deprivations in that no emergency situation existed at that time and thus the plaintiffs were constitutionally entitled to minimal procedural due process. In any event the Court ruled that an emergency situation did not justify transfer to another housing unit without notice of the charges, or a hearing. The Court also found that

defendants did not comply with its Rules and Regulations, in that § 251.6(f) permitted keeplock, not transfer, and plaintiffs sustained the allegations in the complaint. The Court found the defendants liable for damages on the grounds that defendant LaVallee who was Superintendent allegedly ordered the state of emergency and the transfers into segregation and Russell Oswald as Commissioner allegedly knew of these actions. Compensatory damages in the amount of $71[illegible] in favor of plaintiff Gilliard, $740.00 in favor of plaintiff Suggs and $748.25 in favor of plaintiff Bloeth were awarded. Punitive damages were denied by the Court on the grounds that the allegedly improper conduct did not constitute a pattern of behavior on the part of the defendants, situations giving rise to emergencies were rare, and the actions of the prison officials should not be unduly restricted in such emergency situations.

POINT I

THE EMERGENCY MEASURES TAKEN BY CORRECTIONAL AUTHORITIES WERE JUSTIFIED AND IN ACCORDANCE WITH LAW.

The District Court erred in that it found personal liability for monetary damages on the mere substitution of its own hindsight judgment for that of the defendant LaVallee, which was made during what both defendants in good faith believed to be an emergency situation and at a time when the state of law governing such situations was uncertain. Hoitt v. Vitek, 497 F. 2d 598 (1st Cir. 1974). The Court below acknowledged that emergency situations occur very rarely and that the actions of prison officials should not be unduly restricted. However, it's decision founded liability for damages not on any bad faith or malice but on an erroneous finding that as of February 23, 1973 no type of emergency existed which would justify the segregation of the plaintiffs. Moreover, the Court failed to cite one case which was applicable at the time of defendants' actions which forbade the conduct at issue or presented any guide whatsoever for the defendants in determining the legality of their actions.

As will be shown below, a review of the record in the instant case demonstrates that at all times the defendants not only acted in good faith but also exercised reasonable judgment.

The uncontroverted facts at trial revealed that several inmates were assaulted by other inmates, in some instances requiring hospitalization (T. 104-105). The situation reached the point that considerable unrest and tension existed, and inmates were in fear of their lives. In the judgment of the Superintendent, and on the advice of the Deputy Superintendent in charge of Security (T. 105) it was necessary to declare an emergency and shut down the facility, clearly a rare and drastic measure. The legality of this action was not contested by the lower court nor is it in issue here. The Superintendent was then faced with the dilemma of how to make the prison secure, eliminate the increasing number of assaults, and best protect the inmate population. In his expertise the Superintendent ordered practically the entire prison population keeplocked, and a search of each inmate as well as of the entire facility (T. 107-108). At the same time an investigation was instituted dividing the facility into

fourteen sections. All the inmates and employees were canvassed seeking information as to who was responsible for the assaults and disruptions (T. 136). The above tasks were understandably difficult and time consuming. The facility at that time housed 1,600 inmates (T. 143). To search all the inmates took five days and to search the facility took approximately fourteen days (T. 144-145). Likewise the gathering and screening of information was equally time consuming.

After investigation fourteen independent lists containing names of inmates who were suspected or accused of being involved in the assaults or disruptions, were compiled. The names of the plaintiffs as well as those of over a hundred other inmates, appeared on several of the lists (T. 154). At this point it was clear that a further and more intense investigation of these inmates and the accusations against them was necessary. The Superintendent had the responsibility of protecting the inmate population. Serious assaults had taken place and fear had been expressed. It was felt that for the safety of the majority of the population, it was necessary to

segregate these hundred or so inmates pending the further investigation. It is clear that the segregation was not done with malice, or because of the religious or political views of these inmates or because of litigation instituted by such inmates. This segregation was imposed only for the protection of the inmate population and to facilitate the pending inquiry. The facility certainly had no interest in treating the inmates as though they were guilty, but was concerned with protection only. In fact, there was uncontroverted testimony at trial that as the inmates had stated that they felt their safety returning with the transfer of each of the previously segregated inmates (T. 186).

Clearly supporting the wisdom and good faith on the part of the Superintendent in segregating plaintiff Bloeth during the emergency is the fact that this Court has already recognized plaintiff's dangerous propensities in affirming the legality of his segregated confinement while at Attica Correctional Facility. This Court stated in Bloeth v. Montanye, 514 F. 2d 1192, 1195 (2d Cir. 1975):

"Finally in view of Bloeth's criminal record, the general recent incidents of his resisting orders from prison officials and his frequent transfers of late between state facilities the district court cannot be faulted for giving great weight to the prison officials conclusion that Bloeth presented a clear and imminent danger to the facility, its employees and inmates because of past action and attitude."

Certainly the Court below erred in not considering the rights of the majority of the inmates at the facility. It is clear that the inmate population had a right to be free from assault and fear, and to receive adequate protection while incarcerated at the facility. Cf. Penn v. Oliver, 351 F. Supp. 1292 (E.D.Va. 1972). Since the Superintendent had a duty to provide such protection, he had to balance the rights of the majority of the inmates against the purported rights of a few. Had these inmates not been segregated and another inmate been assaulted, the facility as in past cases could have been sued by the assaulted inmate and possibly subjected to liability for a lack of adequate protection. See: Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973); Parker v. McKeithen, 330 F. Supp. 435 (E.D. La. 1971).

The District Court found that the length of the confinement of the plaintiffs in segregation without a hearing violated their due process rights. Yet the Court completely neglected to look to the realities of the situation with which the defendants were faced. The Supreme Court in Pell v. Procunier, 417 U.S. 817, 822 (1974) stated that constitutional freedom of prisoners must be balanced against the legitimate policies and goals of the corrections system. In making this analysis the "special characteristics of the ... environment" must be considered controlling" Procunier v. Martinez, 416 U.S. 396, 409-410 (1974). In the instant case, as previously shown, it became necessary to conduct an intensive investigation of over one hundred inmates with only the normal workforce which the facility had at its disposal. The process was understandably slow. Indeed, it is important to remember that the facility was dealing with over a hundred possibly dangerous inmates in a facility of sixteen hundred men, not merely three inmates suspected of disruptive conduct. Certainly the delayed segregation due to administrative necessities does not warrant liability or monetary damages. By analogy, even those who are presumed innocent sometimes spend over

a year incarcerated without receiving a trial. This situation which is likewise due to the large number of cases and administrative problems does not render those who administer the Courts liable for monetary damages. In the case at bar, there is no foundation for a finding of liability and assessment of damages against prison administrators compelled to make a difficult professional judgment.

The District Court further found that "no continuing state of emergency existed at Clinton Correctional Facility from February 23, 1973 to late March, 1973 which justified plaintiffs' summary confinement in special housing units." This finding demonstrates the hindsight judgment upon which the Court based its finding of liability. It could well be that the Superintendent's action in segregating all the inmates prevented a continuing emergency situation and was the very reason for the alleged termination of such emergency. In the case of LaBatt v. Twomey, 513 F. 2d 641, 647 (1st Cir. 1975) which likewise involved an emergency keeplock with restricted status, the Court stated:

> "The psychology and social stability of a prison community are foreign to one who is not involved with it on a day-to-day basis. Any attempt to reconstruct, at a later date, the conditions present at the time of dispute, and the dangers then feared by prison authorities, is fraught with perils of misunderstanding and mis-apprehension.
>
> Accordingly, the standard of review of a challenge to the sufficiency of the basis for emergency response must be generous to the administration."

Accord: O'Brien v. Moriority, 489 F. 2d 941, 944 (1st Cir. 1974); Hoitt v. Vitek, supra.

Likewise, this Court has cautioned against a Court's finding of constitutional violations in prisons "in the peace of a judge's chambers." Johnson v. Glick, 481 F. 2d 1028, 1033 (2d Cir. 1973) cert. den. 414 U.S. 1033 (1973).

This circuit has repeatedly stated that prison officials are entitled to wide latitude and discretion in handling their problems and anticipating the probable consequences of allowing certain conduct. LaReau v. MacDougall, 473 F. 2d 974, (2d Cir. 1972); Christian v. Skinner, 468 F. 2d 723 (2d Cir. 1972); United States ex rel. Walker v. Mancusi, 467 F. 2d 51, 53 (2d Cir. 1972).

Moreover in a situation of escalating violence or riots the Courts have uniformly held that normal due process requirements may be delayed. Moiris v. Travisano, 509 F. 2d 1358, 1360-61 (1st Cir. 1975); Gray v. Creamer, 465 F. 2d 179, 185 (3rd Cir. 197 2); Mills v. Oliver, 367 F. Supp. 77, 79-80 (E.D. Va. 1973).

In a similar case of United States ex rel. Walker v. Mancusi, 467 F. 2d 51, 53(2d Cir. 1972) which involved segregated confinement subsequent to the Attica riots, this Court stated:

> "Prison authorities must of necessity be allowed wide discretion in the use of protective confinement for the purpose of protecting the safety and security of the prison and its general population."

The existence of evidence that the segregated inmates were a threat to the security of the prison was found to provide adequate grounds for segregation and overcome any equal protection claim.

This Court in refusing to find an Eighth Amendment violation further noted that unlike the conditions in Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971)

the segregated inmates received the same food as those in the general population. They received showers, reading material and no loss of good time. Likewise in the case at bar plaintiffs along with the other segregated inmates did not suffer substantial deprivations. They received the same food, as the general population, exercise and shower privileges, some personal property, visits, and suffered no loss of good time. Although plaintiffs could not perform their jobs, two of the plaintiffs Suggs and Gilliard were unemployed and thus suffered no loss of wages. Indeed unlike Sostre v. McGinnis, supra, plaintiffs segregation was administrative.

Even assuming arguendo that in the case at bar due process required a hearing prior to or during segregation there exists a clear exception in "' extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"' LaBatt v. Twomey, supra at 647 quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971). In applying the above principle the Court held that a good faith response to apprehend emergency conditions in a prison is within the exception.

As the Court in Mills v. Oliver, supra at 79-80 stated:

> "Although an inmate is always entitled to a hearing as soon as practicable, flexibility is inherent in such a rule. The Court notes that in the aftermath of the riot, not only was an investigation necessary in order to determine which inmates were to be properly charged, but a large number of cases requiring Adjustment Committee and Classification Committee action were suddenly thrust upon prison authorities." Id. at 79-80.

This Court has recognized the necessity of flexibility in Powell v. Ward, __ F. 2d __ Slip Op. 527 (Sept. 17, 1976) by ruling that the seven day requirement for Adjustment Committee hearings could be extended in emergency situations. Even where the lockup was not caused by inmate disruption but by a threatened walkout by prison guards the lockup, which for some inmates lasted up to two months was found to be a valid exercise of discretion. See Hoitt v. Vitek, supra. The Court ruled that the lockup was a permissible exercise of discretion due to the unusualness of the situation, the unsettled state of the law and the Court's hesitation to second-guess the defendants.

In summary, the action of defendants in the instant case was permissible and amply supported not only by the emergency but by the sheer number of inmates which the facility had to investigate and to protect. This prompt action, including the temporary segregation of plaintiffs, may well have prevented a more serious danger to the security of the inmate population.

POINT II

ASSUMING ARGUENDO THAT PLAINTIFFS' CONSTITUTIONAL RIGHTS WERE VIOLATED, THE DISTRICT COURT'S CONCLUSION THAT DEFENDANTS LaVALLEE AND OSWALD WERE PERSONALLY LIABLE WAS CLEARLY ERRONEOUS IN VIEW OF THEIR GOOD FAITH AND THE UNSETTLED STATE OF THE LAW AT THE TIME.

Even assuming arguendo, the Superintendent miscalculated as to the length of time an actual emergency existed or misjudged as to the necessity of the initial segregation of the plaintiffs or the length of such segregation, any purported error was indeed an error in judgment only and not an action warranting liability of the Superintendent or the Commissioner for monetary damages.

It should be noted at the outset that the plaintiffs never alleged nor proved any absence of good faith. It is clear that good faith is a defense in a civil rights action. Pierson v. Ray, 386 U.S. 547, 577 (1967). The Court in LaBatt v. Twomey, supra at 648 stated that in order to recover in an action in damages "requisite allegations such as bad faith excessive neglect or arbitrary action" are necessary.

Indeed, proof of bad faith is required. The Court in Hoitt v. Vitek, supra at 600 in quoting Palmigiano v. Mullen, 491 F. 2d 978, 980 (1st Cir. 1974) stated that before there can be recovery there must be proof of "bad faith or at least such a degree of neglect and malice ... as to deprive defendants of official immunity for merely erroneous action." In the instant case no bad faith was alleged nor proved. Plaintiffs' claims merely amount to an allegation of an error in judgment. It is significant to note that plaintiffs never contended that the Superintendent did not believe an emergency existed. It was on this basis that the court Hoitt v. Vitek, supra at 600 f.n. 1 distinguished the Supreme Court decision in Scheuer v. Rhodes, 416 U.S. 232 (1974) and held that where

the subjective good faith of the defendants was never put in issue the defendants need not disprove an unknown or unalleged claim.

Not only was bad faith not alleged or proved, but applicable law was uncertain and unsettled. The Supreme Court in Wood v. Strickland, 420 U.S. 304, 308 (1975) where expelled students sued school board members under 28 U.S.C. § 1983 for punitive and compensatory damages, found that the appropriate standard in assessing liability was both subjective and objective. The Court ruled that compensatory damages will only be awarded if the defendants acted with "impermissible motivations or with such disregard of clearly established (emphasis supplied) constitutional rights that the actions cannot reasonably be characterized as being in good faith."

The principles of Wood v. Strickland also apply in the context of prisons. In a recent decision of the Seventh Circuit, the Court ruled that prison officials had reasonably relied on standards existing at the time of the practices challenged and accordingly could not be

said to have disregarded plaintiffs' established constitutional rights. Knell v. Bensinger, 522 F. 2d 720 (7th Cir., 1975). The Court applied the two pronged "subjective" and "objective" tests of Wood v. Strickland to the prison context, and found good faith under both standards. In the case at bar the defendants acted in good faith for the protection of the majority of the inmates. The segregation was not and was never alleged to be punitive or taken as a reprisal. No possible reading of the evidence adduced at trial could show that these defendants acted with impermissible motives or with such a disregard of clear constitutional rights as to amount to bad faith.

The "clearly established rights" requirements likewise is law in this Circuit. In Burham v. Oswald, 333 F. Supp. 1128, 1131 (W.D.N.Y., 1971), the Court said:

> "A disagreement among reasonable men does not, however, necessarily rise to the level of a violation of constitutional rights. Before a federal court can act under the Civil Rights Act, there must be a clear violation of the constitutional rights of the party seeking relief. Although there

> is no doubt that in recent years the federal courts have subjected the administration of prisons to increased scrutiny, a federal court will not substitute its own judgment about what restrictions are required for the safety and security of the institution for that of the prison administrator unless a violation of constitutional rights is clear." (Emphasis added)

This doctrine has recently received specific approval from the Second Circuit. In MukMuk v. Commissioner, 529 F. 2d 272, 275 (2d Cir. 1976) cert. den. __ U.S. __ (6/1/76) the Court stated (at 277-278):

> "While there are instances of abuse so shocking to the conscience as to require no judicial pronouncement for their general recognition, (citation omitted) there are other types of deprivation of rights which may be recognized as unconstitutional for § 1983 purposes only when they are judicially so declared."

The Court then went on to quote the "clearly established constitutional rights" requirement set forth in Wood v. Strickland, supra.

It is impossible under any view of the facts to hold that plaintiffs were deprived of clearly established constitutional rights, since the rights they assert were not established as of March, 1973 and are not even clearly established now.

The state of the law at that time provided no guidelines as to the permissible conduct of prison officials in dealing with emergency situations. The leading case of Wolff v. McDonnell, 418 U.S. 539, 573-74 (1974) was decided on June 26, 1974 over a year after the events in the case at bar. The Supreme Court has repeatedly stated that its rulings in the area of reform of the criminal justice system are not retroactive. Cox v. Cook, 95 S.Ct. 1237 (1975); Wolff v. McDonnell, supra at 573-74; Morrissey v. Brewer, 408 U.S. 471.

Moreover, the case of Wolff v. McDonnell, like Sostre v. McGinnis, dealt with punitive rather than administrative segregation, and did not develop standards as to emergencies and as to delay of hearings in such circumstances.

As the Supreme Court stated, officials cannot be "charged with predicting the future course of constitutional law. Good faith reliance of prison officials on prior law or the uncertain state of prior law must be considered. Haines v. Kerner, 492 F. 2d 937, 941 (7th Cir. 1975); State v. McFetridge, 484 F. 2d 1169, 1174 (7th Cir. 1973).

The Circuit Courts have recognized that in 1973 the state of law contained no guidelines as to the kind of situation which occurred in the case at bar. In Hoitt v. Vitek, supra at 602 which dealt with an emergency lockup, the Court stated that:

> "Since, as we have noted, there has been virtually no guidance given on this subject, the district court acted properly in dismissing the complaint. We add that we view this as an exceedingly rare kind of disposition applicable only in an exceptional situation where, as here a broad field of conduct has been singularly bereft of standards, some of which we hope we have now supplied."

The District Court also gives great weight to the purported failure on the part of the Superintendent to comply with § 251(6)f and d of the Department of Corrections Rules and Regulations. The law is clear that a prisons failure to comply with its rules or policy does not render such failure a due process violation Floyd v. Henderson, 456 F. 2d 1119, 1120 (5th Cir. 1972). Moreover, the District Court's reading of the Regulation is erroneous. Section 251(6)f does not forbid segregation and Section 251(6)d does not deal with emergency situations but provides guidelines for segregation during the normal course of events at a facility.

POINT III

THE DISTRICT COURTS FINDING THAT DEFENDANT OSWALD HAD KNOWLEDGE OF THE SEGREGATION AND WAS THEREFORE LIABLE WAS CLEARLY ERRONEOUS.

The decision holding Russell Oswald, then Commissioner of Corrections, personally liable for damages was extraordinary. Without the benefit of supporting

discussion, the District Court found as a matter of "fact" that Oswald was "informed and personally aware" of the allegedly illegal confinement of plaintiffs and that he "personally participated" in the treatment accorded to plaintiffs. The evidence shows otherwise.

Defendants Exhibit "i", consisted of a memo dated February 22, 1973 from defendant LaVallee to defendant Oswald. The memo, after referring to numerous telephone conversations with a Deputy Commissioner, described briefly that the situation was felt by LaVallee to be of emergency proportions. The memo stated that LaVallee, with "your permission," had closed down the facility.

The memo stated that investigation into the causes of disturbance was "immediate." The memo stated that careful screening of the entire population had begun "immediately." The memo stated further that action was taken in accordance with § 251.6(f), and that some individuals may be released without disciplinary charges, but added that "(w)e ... feel that the retention and

classification is necessary for the security and safety of the institution. At this time, all due haste is being taken to dispose of those cases." The list attached to the memorandum indicated that plaintiffs were in keeplock status pending investigation.

There was no evidence that Oswald received or read this memorandum. Assuming arguendo that he did so, it is clear that the memorandum, far from tending to show any "evil" knowledge on Oswald's part, would give Oswald every reason to believe that the problem was being handled reasonably and responsibly by his subordinates.

The second memorandum dated March 2, 1973 which was offered in evidence as defendants Exhibit "K" indicating that plaintiffs were in segregation was not sent to defendant Oswald but to Deputy Commissioner Quick. There is absolutely no evidence indicating that defendant Oswald ever saw or read this memorandum or even knew that plaintiffs were in segregation. Likewise, there is no evidence that defendant Oswald ever saw or read the report of the Executive meeting held at Clinton on February 23, 1973 and offered into evidence as Exhibit "J".

None of the leading "personal involvement" cases support the proposition that any purported personal contact here was sufficient to state a claim for § 1983 liability and damages.

In Martinez v. Mancusi, 443 F. 2d 921 (2d Cir., 1970), cert. den. 401 U.S. 983, the Court found that a cause of action was stated against a warden who was alleged to have personally been aware of, and indifferent to, plaintiff's delicate medical requirements. In Wright v. McMann, 460 F. 2d 126, 135 (2d Cir., 1972), a predicate for § 1983 liability against a warden was found where state law charged the warden with specific responsibility for strip cells and evidence at trial showed the warden had actual knowledge of the conditions of the cell.

However, in Sostre v. McGinnis, supra, the Commissioner was not held liable where there was no evidence he knew of the warden's improper motives. It was the warden's improper motives which formed the basis of the damage claim against him.

What emerges from these cases is the need of a highly specific link between a defendant and an alleged wrong. These links consist of personal knowledge, bad faith and direct responsibility. Those links simply do not exist here. There is no evidence that defendant Oswald participated in an alleged wrongdoing, had any knowledge of alleged wrongdoing, or had any reason to suspect wrongdoing, had any bad motive, or had the direct responsibility necessary to impose liability.

Moreover, the doctrine of respondeat superior does not apply to civil rights actions. Johnson v. Glick, supra at 1034. Thus Commissioner Oswald cannot be charged with liability merely because he was in a high position of authority. Since there was no proof whatsoever that defendant Oswald knew that plaintiffs were segregated, no personal liability for damages may be assessed.

CONCLUSION

THE ORDER OF THE COURT BELOW SHOULD BE REVERSED AND THE COMPLAINT DISMISSED.

Dated: New York, New York
November 1, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
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Appellants

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOAN P SCANNELL being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for defendant-appellant herein. On the 1 day of Nov, 1976. She served the annexed upon the following named person :

Mr. David Englander Esq
Prisoners Rights Project
15 Park Row 19th Floor
NY, NY 10038

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Joan P Scannell

Sworn to before me this
1 day of Nov, 1976.

David L. Bird

Assistant Attorney General
of the State of New York